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IN THE
Supreme Court of the United States
OCTOBER TERM, 1967

No. **309**

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED
STATES AND CANADA AND ASSOCIATED MUSICIANS OF
GREATER NEW YORK LOCAL 802, ET AL., *Petitioners,*

v.

JOSEPH CARROLL ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 372 F.2d 155 and is reprinted in Appendix A, pp. 1a-27a, *infra*. The opinion of the District Court for the Southern District of New York is reported at 241 F. Supp. 865 and is reprinted in Appendix B, pp. 28a-82a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1967. On April 26, 1967, Mr. Justice Harlan entered an order extending the time to file a petition for *certiorari* to June 29, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED¹

1. May union regulations, designed to preserve employee job and wage standards, be denied the labor exemption to the antitrust laws, although the union has not combined with any non-labor group in their enforcement?
2. May union regulations, which preserve employee wage standards by establishing the minimum compensation which an employer must receive for work performed in competition with its members, be declared unlawful under the Sherman Act on the theory that they deal with a nonmandatory subject of bargaining?

STATUTORY PROVISIONS INVOLVED

This case involves § 1 of the Sherman Act, 26 Stat. 208, 15 U.S.C. § 1; §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U.S.C. § 17 and 29 U.S.C. § 52; and §§ 4 and 13 of the Norris-LaGuardia Act. 47 Stat. 70 and 73, 29 U.S.C. §§ 104 and 113. These are reprinted in pertinent part in Appendix C, pp. 83a-86a, *infra*.

STATEMENT OF THE CASE

INTRODUCTION

This case represents another effort to invoke the antitrust laws to prohibit union regulations designed to protect the jobs and wage standards of its employee-members. The Court of Appeals, with Judge Friendly dissenting, has held that petitioner unions may not determine the price which their member, a musician known as the leader, must charge to the purchaser of

¹If *certiorari* is granted, petitioners will also argue the following question: Did the Court of Appeals properly decide that leaders in the musical club-date field are employers?

the music on certain engagements known as "club dates". The Court below so held, although the leader, whom it denominated the employer of the musicians, was found to be a member of a labor group and thus properly subject to unionization. As we shall show herein, that decision, which destroys a historic practice of fundamental economic importance to professional musicians, is an abrupt departure from this Court's precedents governing the relationship between union activity and the antitrust laws, and particularly the right of unions to protect their members against job and wage competition from working independent contractors.

A. The Underlying Facts.

The regulations invalidated by the Court below involve musical engagements known as club dates, which are social engagements such as weddings, confirmations, and commencements. Normally, the purchaser of the music (the father of the bride, organizational social chairman, etc.) approaches a musician with a request for a specified number of instrumentalists at a particular time and place. This musician thereby becomes the "leader", who obtains the other musicians who perform the engagement. When the leader performs himself, he conducts the musicians and usually also plays an instrument. When the leader does not perform the engagement himself, the identical leading functions are fulfilled by a subleader (Finding 36, p. 35a, *infra*), and his instrument is played by a sideman (Finding 44, p. 36a, *infra*). It was stipulated, and the Courts below agreed, that the sidemen and the subleader are employees. There is controversy as to whether the leader is an employee or an employer on

club dates;² but both Courts below held that even if the leader is an employer, he is, for the purposes of antitrust laws, a member of a "labor group" properly subject to unionization. (Pp. 23a; 71a-72a, *infra*). This conclusion was based on the District Court's elaborate findings of job and wage competition and other economic interrelationship between musicians who perform as leaders on club dates and other musicians, admittedly employees, represented by petitioner unions. Only a few musicians in the club-date field are full-time leaders. A considerable number of musicians act only occasionally as leaders and act as sidemen the rest of the time, competing with each other and with the full-time leaders for engagements.³

² The Court of Appeals, citing earlier cases involving some of the same parties as in the present case, asserted that all leaders are employers in the club-date field (P. 6a, *infra*). However, it was previously decided only that the plaintiffs and other leaders who perform in the same manner, are employers; this was the position of plaintiffs herein. It has throughout been the unions' position that the purchaser of the music rather than the leader is the employer. As the pretrial order herein shows, both parties assumed that all other leaders in the club-date field were employees. (See e.g. Par. 8(a) and (b), Appendix to Appellant's Brief in the Court below, unnumbered volume, p. 91, hereafter cited as "App.") The District Court found it unnecessary to make a finding on this issue, properly considering the critical issue to be whether the leaders are members of a "labor group" as to which their employer status would not be determinative. (P. 67a, *infra*) For that reason, we do not rely on the Court of Appeals' error on this point as a separate ground for granting *certiorari*, but preserve the issue for review in the event that *certiorari* is granted. See P. 2, n.1, *supra*.

³ Also significant is the mobility of employment in the music industry generally. Musicians who perform as leaders in the club-date field also play as leaders or sidemen in other parts of the music industry where the leader is concededly an employee, while musicians who perform regularly in these other fields also work as leaders, subleaders, and sidemen in the club-date field when they are not otherwise engaged. (Finding 29, P. 33a, *infra*).

The impact of the leaders' working on employee jobs was described as follows by the District Court:

"* * * when one of the plaintiffs personally led his band he occupied a job that was a potential position for a subleader. When a plaintiff played an instrument as well as conducted, he filled a slot that was a potential job for a sideman and also displaced a subleader. In displacing sidemen and subleaders from potential jobs, plaintiffs engaged in job competition with them.

"As a consequence of this relationship, the practices of plaintiffs when they lead and play must have a vital effect on the working conditions of the non-leader members of the union. If they undercut the union wage scale or do not adhere to union regulations regarding hours or other working conditions when they perform, they will undermine these union standards. They would put pressure on the union members they compete with to correspondingly lower their own demands."⁴

In order to prevent such undermining of union standards, petitioner Local 802 adopted the regulations which were invalidated below. These regulations require the leader to charge the purchaser of the music a minimum price which is not less than the aggregate of the minimum compensation payable to sidemen and leaders. (Finding 79, p. 46a, *infra*).⁵

⁴ Pp. 68a-69a, *infra*, footnote omitted. These conclusions were based on findings 31-45, Pp. 34a-36a, *infra*.

⁵ The leader's basic compensation is 25% to 100% above the wages payable to sidemen, depending upon the number of musicians playing the engagement. Finding No. 74, Pp. 44a-45a, *infra*. The leader has traditionally received double the sidemen's scale as his minimum compensation in almost all areas of the music industry, including, *e.g.*, television, radio, and phonograph recordings, where the leader was found to be an employee. In addition to this

B. The Proceedings Below.

1. The District Court.

This case arises out of two complaints brought by orchestra leader members of defendant American Federation of Musicians of the United States and Canada and its New York affiliate, Local No. 802.⁶ The first complaint was filed on July 29, 1960; the second was filed on December 15, 1960. On May 22, 1961, they were consolidated and joined with two other cases (not arising under the antitrust laws) brought by the original plaintiffs. However, by stipulation, the issues in the other two cases were tried first and the record there made incorporated in this case.⁷

The complaints attacked numerous practices of defendants in all phases of the music industry. Following a lengthy trial, the District Court on May 17, 1965, issued its decision dismissing the complaint in its

basic fee the leader must also be paid as part of his minimum scale compensation on club dates a sum equal to 8% (it was initially fixed at 7%) of the scale wages of the leader and the sidemen. The purpose of the 8% is to reimburse the orchestra leader for his out-of-pocket expenses for social security, unemployment insurance, and bookkeeping. (Stipulated Facts 19-23; App. 72-73).

⁶ The individual defendants, and petitioners here are officers of defendant unions. The respondents are two of the original plaintiffs, Joseph Carroll and Charles Peterson, and two intervenors, Marty Levitt and Ben Cutler. The other plaintiffs withdrew in the course of the District Court proceedings. Since the filing of the suits, Carroll and Peterson were expelled from defendant unions but for reasons unrelated to this litigation. See Findings No. 4 and No. 5, pp. 29a-30a, *infra*.

⁷ Several motions were filed by plaintiffs for preliminary injunction on the antitrust complaints. The District Court granted one such motion on October 16, 1962, but the Court of Appeals reversed. *Carroll v. A.F.M.*, 310 F. 2d 325 (C.A. 2).

entirety. The Court made comprehensive findings carefully annotated to the transcript of the trial record and the stipulations of the parties. The Court introduced its discussion of the antitrust issues by pointing out that under *Allen Bradley Co. v. Local 3, I.B.E.W.*, 325 U.S. 797, the "unions could not, 'consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services'. Id. at 808". (P. 65a, *infra*) It then examined prior decisions of this Court to determine the meaning of the term "non-labor group" and concluded that the criterion used in the decisions "was the presence of job or wage competition or some other economic interrelationship affecting legitimate union interest between the union members and the independent contractors". (Pp. 65a-66a, *infra*) The Court then addressed its attention to whether the plaintiffs were a labor or non-labor group. Pp. 67a-70a, *infra*. Based on his findings, described above, pp. 4-5 *supra*, he concluded that they were a "labor group." He thus determined that under *Meat Drivers v. United States*, 371 U.S. 94 and *Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, that it was lawful to compel them to join the unions. Turning his attention to the legality of the price lists, he found them to be justified by the competition between leaders and sidemen and subleaders and therefore lawful, citing *inter alia*, *Teamsters Union v. Oliver*, 358 U.S. 283. Finally, finding no evidence in the record to indicate that the price lists were established as part of a conspiracy with "non-labor groups to create business monopolies and control the marketing of goods and services", he declared *Allen Bradley Co. v. Local 3, I.B.E.W.*, 325 U.S. 797 to be inapplicable.

The complaint's allegations that defendants had violated the antitrust laws by other activities were also considered and dismissed.

2. The Court of Appeals.

The Court of Appeals did not disturb the District Court's findings of fact,⁸ and, with a single exception, it affirmed the District Court's dismissal of the complaint. Of particular significance is the Court's rejection of plaintiffs' claim that they could not be required to be union members:

"Even those orchestra leaders who, as employers in club dates, lead but never perform as players, are proper subjects for membership because they are in job competition with union sub-leaders; each time a non-union orchestra leader performs, he displaces a 'union job' with a 'non-union job.' " (P. 23a, *infra*.)

However, the Court held that it was unlawful for the unions to fix the minimum price which the leader must charge to the purchaser of the music in the club-date field. It agreed with the District Court that the defendants had not combined with a non-labor group to fix prices, and thus rejected plaintiff's principal contention that the unions' conduct came within *Allen Bradley Co. v. Local 3, I.B.E.W.*, 325 U.S. 797, and *Mine Workers v. Pennington*, 381 U.S. 657. (Pp. 14a-16a, *infra*). However, the Court decided that the price regulations were invalid under *Meat Cutters v. Jewel Tea*, 381 U.S. 676. Without noting that these regulations were directed solely at members of a labor group—the leaders—the Court applied to them the standard

⁸ There are, however, two or three statements of fact in the Court of Appeals' opinion which are not based on the findings and which appear to be contrary to the record. One of these, which the Court of Appeals thought to be material, is described at n. 14, *infra*.

for measuring the legality of agreements between unions and non-labor groups which it understood had been established by *Jewel Tea*. It was the majority's view that *Jewel Tea* held such an agreement to be protected by the labor exemption to the antitrust laws only if it deals with a mandatory subject of bargaining. On that assumption, and bearing heavily on the fact that petitioners' regulations governed "prices", the Court held that they did not deal with a mandatory bargaining subject but rather constituted price-fixing, and were a *per se* violation of the Sherman Act. Judge Friendly dissented, saying *inter alia* that it "would be a serious misunderstanding" to read *Jewel* as holding that only union agreements on mandatory subjects of bargaining are exempt from the antitrust laws. "Where, as here, the union rule merely sets a floor under the price at which one union member may sell his services to customers in competition with others, the union needs no such special justification as it did in *Jewel Tea* for regulating what would ordinarily be management prerogatives of independent business men employing union members." (P. 27a, *infra*)

REASONS FOR GRANTING THE WRIT

I. The Court Below Has Decided a Question of General Importance in Conflict with Long-Established Precedent in This Court.

Despite its express finding that leaders are a labor group, properly the subject of unionization, the Court of Appeals held that petitioners' internal regulations establishing a minimum price which the leader-member must charge the purchaser of the music violate the anti-trust laws. That decision is contrary to an unbroken

line of decisions in which this Court has held union activities to be exempt from the antitrust laws unless undertaken in combination with a non-labor group. In *United States v. Hutcheson*, 312 U.S. 219, it was held:

"So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." 312 U.S. at 232. (Emphasis added.)

Hutcheson was reaffirmed in *Allen Bradley Co. v. Local 3, I.B.E.W.*, 325 U.S. 797 at 807 and in *Hunt v. Crumboch*, 325 U.S. 821, 825, although liability was found in *Allen Bradley* because the union had participated in a conspiracy with businessmen which violated the antitrust laws. The foregoing language from *Hutcheson* was quoted with approval in *Mine Workers v. Pennington*, 381 U.S. 657, 662. In *Mine Workers* and its companion case, *Meat Cutters v. Jewel Tea*, 381 U.S. 676 this Court was divided on the issue of what agreements between labor unions and non-labor groups, if any, remained exempt under the antitrust laws. But the necessity of some form of agreement or combination between labor and non-labor groups as a predicate for a Sherman Act violation was a common premise of all the opinions written on that occasion. Plainly, the *Jewel Tea* case, on which the Court below relied, did not overrule the earlier holdings that a union can only violate the antitrust laws when it acts in combination with non-labor groups, for in *Jewel* the ultimate issue was stated to be whether the agreement between the unions and the Jewel Tea Co. was exempt from the

antitrust laws. See *e.g.* 381 U.S. at 688-89 (opinion of Mr. Justice White).⁹ Our understanding of the law as it remains after *Pennington* and *Jewel* is confirmed by *Cedar Crest Hats v. United Hatters, etc.*, 362 F. 2d 322, where the Fifth Circuit said:

"Our reading of the Supreme Court decisions in *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797 and the more recent cases of *United Mine Workers of America v. Pennington*, 381 U.S. 657 and *Local Union No. 189, Amalgamated Meat Cutters, etc. v. Jewel Tea Co.*, 381 U.S. 676, convinces us that in order for union activity to constitute a violation of antitrust laws in the circumstances here presented, there must be a combination of union and non-union business groups to create a monopoly, resulting in a restraint of trade or interstate commerce." 362 F. 2d at 326.

We submit that the Court of Appeals' decision is so plainly contrary to the precedents in this Court that the grant of *certiorari* becomes most compelling. Moreover, review should be granted to correct the Second Circuit's failure to understand, as the Fifth Circuit so clearly has, that *Jewel Tea* did not alter the central meaning of the labor exemption to the antitrust laws. The decision below, by depriving union regulations directed only to a labor group of this exemption, threatens to revive antitrust challenges to unilateral union practices which *Hutcheson* and subsequent decisions have hitherto been thought to preclude.

⁹ The Court below treated Mr. Justice White's opinion as the authoritative statement of what *Jewel* decided. It should be pointed out, however, that the basis on which Mr. Justice Douglas and those who joined him would have found liability, was that the multi-employer agreement between the unions and the chain stores violated the Sherman Act under *Allen Bradley*. See 381 U.S. at 735-736.

II. The Decision Below, by Misconstruing the Holdings of This Court, Destroys the Right of Unions To Protect Employee Standards From Competition by Working Employers.

Even if, contrary to 25 years of authority in this Court, independent union activities are now to be subject to the same test as agreements between unions and non-labor groups, review of the decision below would be necessary. For the Court below has nullified the right of unions to protect their employee members from the evasion of union wage standards by competition from working employers, a right vouchsafed by this Court's decisions in *Milk Wagon Drivers v. Lake Valley Farm Products*, 311 U.S. 91, and reaffirmed in *Bakery and Pastry Drivers v. Wohl*, 315 U.S. 769; *Teamsters Union v. Oliver*, 358 U.S. 283; *Meat Drivers Union v. United States*, 371 U.S. 94, 103; *Cf. Senn v. Tile Layers Union*, 301 U.S. 476. To achieve this destructive result, the Court below not only misconceived those precedents, particularly *Oliver*; it discovered in *Meat Cutters v. Jewel Tea, supra*, a novel and far-reaching limitation on the labor exemption to the antitrust laws. The Court read *Jewel* to have held that the labor exemption applies only to a matter which is a mandatory subject of bargaining under the National Labor Relations Act (Pp. 16a-18a, *infra*), a view which would severely inhibit collective bargaining between all unions and employers. But we submit, in agreement with Judge Friendly, who dissented below, that this is a "serious misunderstanding" of *Jewel Tea*.¹⁰ When this Court held that a party may not

¹⁰ The majority below referred to certain language in Mr. Justice White's opinion as requiring this interpretation. However, Mr. Justice White and those who joined him did not purport to resolve this question—which was not necessary for decision of the case. They said only that they "seriously doubt" that the labor exemption applies to an agreement over a non-mandatory subject of bargaining. 381 U.S. at 689.

lawfully insist upon agreement with respect to a non-mandatory subject of bargaining, it was careful to point out that this "does not mean that bargaining is to be confined to the statutory subjects". *Labor Board v. Borg-Warner Corp.*, 356 U.S. 342, 349. Indeed, such mutual voluntary agreements often promote the objectives of the national labor policy by extending the areas of cooperation between employers and unions, achieving joint solutions to problems which are properly matters of common concern. Yet unless and until the decision below is reversed, it will stand as an authoritative warning to unions and employers that they experiment at their peril with respect to any subjects regarding which the statute does not compel them to bargain.¹¹

The dangerous implications of the Court of Appeals' interpretation of *Jewel* are aggravated by that Court's narrow view of the scope of mandatory bargaining subjects. Perhaps the critical sentence in its opinion was, "The cases make it clear, however, that price-fixing generally is not only a mandatory subject for collective bargaining but is one toward which union activity may not be directed without violating the anti-

¹¹ Even in one of its most restrictive decisions, the National Labor Relations Board has expressed its awareness "that the subject matter of bargaining must reflect the changing conditions of industrial society and the changing responsibilities of labor and management". *Detroit Resilient Floor Decorators, Local 2265*, 136 NLRB 769, 772, enforced 317 F. 2d 269 (C.A. 6).

trust laws.”¹² Pp. 19a-20a, *infra*. But Mr. Justice White explained in *Jewel Tea* that the “crucial determinant is not the form of the agreement—e.g., prices or wages—but its relative impact on the product market and the interests of union members.” 381 U.S. at 690, n. 5.

It is of special significance for present purposes that Justice White illustrated that point by reference to *Teamsters Union v. Oliver*, 358 U.S. 283. “In *Oliver*, the disputed clause of the employer-union agreement was “in form a scheme fixing prices for the supply of leased vehicles”. 381 U.S. at 690, n. 5. Nevertheless, it was held to be a mandatory subject of bargaining, because it “was designed ‘to protect the negotiated wage scale against the possible undermining through diminution of the owner’s wages for driving which might result from a rental which did not cover his operating costs.’” *Id.* The design of petitioners’ regulations establishing a minimum compensation for the leader is identical. That compensation is based on his own wage plus his costs, consisting of the total of the sidemen’s wages, social security taxes and book-keeping expenses. See Statement, p. 5 *supra*. Any diminution of that total amount would mean a reduction in the leader’s wage for performing below union scale.

¹² This case can be decided on the basis of existing precedents defining the labor exemption. But it is a separate issue whether, the labor exemption aside, the union regulations violate the Sherman Act. Compare *Jewel Tea*, 381 U.S. at 693 (opinion of White, J.). The Court below disposed of that issue adversely to petitioners almost in passing; focusing on the word “price” it declared the regulations to be *per se* violative of the Sherman Act. In our view however, the matter is by no means so clear, and while not discussed in this petition as an additional reason for granting the writ, is encompassed in our questions presented. Cf. *Apex Hosiery Co. v. Leader*, 310 U.S. 469.

Since the performing leader is in direct competition with employee-subleaders, the result would be, in the District Court's words, an "obvious downward pressure on the wages of subleaders". (P. 73a, *infra*.)¹³ The Court of Appeals itself appreciated this potential consequence, (p. 19a, *infra*) but in concentrating, contrary to *Jewel's* teaching, on the form of the regulation, lost sight of its substance.¹⁴ *Oliver* is thus controlling even on the view that the labor exemption applies only to agreements dealing with mandatory bargaining subjects.

Nor can the result below be justified by the supposed absence of "any authority for holding that an employer must bargain on a labor union's demand that an employer perform no work himself which an employee could do". (P. 20a, *infra*.) We believe that there is

¹³ While recognizing the situation to be different, the District Court also found enforcement of the regulations to be necessary to preserve employee wage standards where the leader does not perform. See pp. 73a-74a, *infra*. If the regulation is to be measured by the standards established for union-employer agreements in *Jewel Tea*, that finding is entitled to substantial weight. See 381 U.S. at 694-697 (Opinion of Mr. Justice White.)

¹⁴ The Court below asserted that "many leaders . . . enhance the demand for the orchestras and provide more work for employees." App. A, p. 20a, *infra*. There are no findings or evidence to support this statement. But there is a more fundamental objection to the Court of Appeals' reasoning. A union's practice is protected from the antitrust laws—and deals with a mandatory subject of bargaining—if it is designed "to protect lawful employee interests against what is believed, *rightly or wrongly*, to be 'a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards.' *Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91-99." *Teamsters Union v. Oliver*, 358 U.S. 283 (emphasis supplied.)

such authority,¹⁵ but in any event numerous compelling analogies (aside from *Oliver*) are close at hand. It has been held to be lawful for unions to protect their jobs against the competition of employees of other employers, foreign¹⁶ and domestic,¹⁷ of the members of other unions¹⁸ or of no unions at all¹⁹ and even of inanimate technological devices.²⁰ Clearly, a practice is no less a term or condition of employment because it protects the same jobs against competition from working employers.

The regulations involved in this case, like those in *Oliver*, regulate the compensation which the employer

¹⁵ We submit that there is such authority.

In the leading case of *Senn v. Tile Layers Union*, 301 U.S. 476, this Court affirmed a decision of the Supreme Court of Wisconsin which had held that a dispute over a demand that the employer not work at the trade is a "labor dispute" within the meaning of the Wisconsin Labor Code. At the next Term, this Court held that a strike for the closed shop was also a labor dispute under the Wisconsin Act, stating that the subject of the controversy was "indistinguishable" from that in *Senn*; *Lauf v. E. G. Shinner and Co.*, 303 U.S. 323, 328. The Court in *Lauf* then stated that the definition of labor dispute in the Norris-LaGuardia Act "does not differ materially from that above quoted from the Wisconsin Labor Code * * *", 303 U.S. at 329. By equating the definitions of "labor dispute" of the Wisconsin Labor Code and the Norris-LaGuardia Act in an opinion which reaffirmed that a strike to prevent an employer from competing with his employees came within the former definition, the Court came very close indeed to holding that it was a dispute under the Norris-LaGuardia Act as well.

¹⁶ *Marine Cooks v. Panama S.S. Co.*, 362 U.S. 365.

¹⁷ *Fibreboard Co. v. Labor Board*, 379 U.S. 203.

¹⁸ *United States v. Hutcheson*, 312 U.S. 219.

¹⁹ *United States v. A.F.M.*, 318 U.S. 743; *N.L.R.B. v. Bradley Washfountain Co.*, 192 F. 2d 144 (C.A. 7); *N.L.R.B. v. Andrew Jergens Co.*, 175 F. 2d 130 (C.A. 9).

²⁰ *United States v. A.F.M.*, *supra*; *United States v. International Hod Carriers, etc.*, 313 U.S. 539.

must receive, rather than forbidding him from working at all. But the Court's observation that the latter method of dealing with employer competition would not be a mandatory subject of bargaining, expands the direct impact of its decision to the many collective bargaining agreements which either forbid or regulate the performance of employee jobs by employers or their representatives.²¹ This industrial experience not only strengthens the claim of such provisions to be mandatory subjects of bargaining, see *Fibreboard Paper Products v. Labor Board*, 379 U.S. 203, 213-214, but increases the importance of this case, because it jeopardizes such agreements under the antitrust laws and implies that a strike to obtain them would be unlawful under *Labor Board v. Borg-Warner*, *supra*. With one stroke, the Court below has thereby deprived unions of all forms of protection against job and wage competition from working employers. Under its decision unions would not only be forbidden from establishing the minimum compensation which such employers or independent contractors must receive—which is the immediate result of the decision below—but would also be barred from insisting that they not compete for employee jobs.

²¹ "In order to maintain employment opportunities of union members and to maintain union wage-and-hour standards, many agreements limit the performance of production work by foremen and employers and regulate the number of foremen and firm members who may work. These provisions are inserted to prevent persons who are not subject to the terms of the agreement from doing work which the union believes should be done by its members." *Union Agreement Provisions*, Bulletin No. 686 United States Department of Labor, Bureau of Labor Statistics (1942). Such provisions are "grist in the mills of the arbitrators". Cf. *Fibreboard*, *supra*, 379 U.S. at 214. See the cases collected at para. 117.339 of the Labor Arbitration Reports published by the Bureau of National Affairs.

This would have a devastating effect on workers in all callings where employees may be subjected to job and wage competition of working employers or independent contractors. Because of the inherent mobility of the American economy, this includes most trades in which the capital requirements for entry are small and the employee income depends on his own labor and skills. The impact of the decision below is particularly severe because petitioners and other unions have relied on the decisions of this Court which have uniformly sustained union regulations designed to preserve the wage standards of "employees" against erosion by such competition, since *Milk Wagon Drivers v. Lake Valley Farm Products Corp.*, 311 U.S. 91.²²

These severe, practical consequences are, we submit, themselves sufficient to warrant review of the decision below. But they do not stand alone in any evaluation of the importance of this case. The holding that only agreements on mandatory bargaining subjects are protected by the labor exemption affects countless agreements between labor and management which contain provisions as to which neither was obliged to bargain; and, as we have sought to show, threatens to paralyze growth in the bargaining process itself.

Most serious, however, is the Court's withdrawal of the labor exemption from independent union action undertaken without agreement or other combination

²² It is paradoxical that the occasion for these sweeping restrictions is an opinion wherein it is also decided—in accord with the same precedents—that leaders are properly subject to unionization because they compete for jobs with the union's employee members. Of course, as *Lake Valley*, *supra*, illustrates, the very purpose of such organization is to prevent the employers from competing below union standards.

with any non-labor group. The precise consequences of this radical departure from principles which had been settled for a quarter of a century cannot now be foreseen. But the history of labor-management relations teaches that contending parties are quick to seize any weapon that comes to hand, justifying the prophecy that the decision below, unless promptly disapproved, will invite much further litigation and will jeopardize or destroy hitherto unchallenged practices developed by unions to preserve the jobs and wage standards of their members.

CONCLUSION

By reason of the foregoing this Petition for Certiorari should be granted.

Respectfully submitted,

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